[fol. 133] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 121

PAUL H. BARNES, Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, ex Rel. EMMA K. BARNES, Respondent

STIPULATION OF COUNSEL AS TO CORRECTIONS IN TRANSCRIPT OF RECORD

It Is Hereby Stipulated and Agreed, on this 6th day of July, A. D., 1943, by and between George W. Cupps, Jr., Esquire, and Charles S. Thompson, Esquire, Counsel for the above named Petitioner, and Samuel Kagle, Esquire, Counsel for the above named Respondent, that the transcript of the Record in the above entitled Cause be and it is hereby corrected, as to certain errors therein, as follows:

Record Page.	Should read:	Instead of:
2 line 4	Walsh, Judge	Rosen, Judge.
14 line 5 from bottom.	other car since that time?	other since that time?
33 line 10 from bottom.	first mortgage for $2500. on No. 2034	first mortgage for $25000 on No. 2034
56 line 9	$1000 Iowa Public Service Co.	$1000 Iown Public Service Co.
56 line 5 from bottom.	No. 2034 S. Frazier St.	No. 2034 S. Frazier Ct.
57 line 3	Paul H. Barnes	Paul W. Barnes.
61 Following line 2 of Statement of Account as line 3 thereof, insert:	Date of Order 1-3-30	Then leave out line 5 from bottom of said statement reading: "Date of that Payment 11-24-41 $15.00."
80 line 15 from bottom.	My brother	By brother.
85 line 15	$602.90	$602.74
87 line 15 from bottom.	226 Walnut Street)	225 Walnut Street)
90 line 10	is seventy years of age.	is seventy years of afe.
93 line 10 from bottom.	January 28, 1943	January 28, 1942.

Record Page.	Should read:	Instead of:
95 line 3	198 A. 338.	193 A. 338.
105 line 2 from bottom.	do show an adverse	do show on adverse
108 line 18 from bottom.	February 17, 1943	February 17, 1942
120 line 9 from bottom.	at 12:40 P. M.,	at 2:40 P. M.,

Charles S. Thompson, George W. Cupps, Jr., Counsel for Petitioner. Samuel Kagle, Counsel for Respondent.

(18)

Office - Supreme Court, U. S.
FILED
JUN 26 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

CHARLES S. THOMPSON,
GEORGE W. CUPP, JR.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA ex Rel. EMMA K. BARNES

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Paul H. Barnes, a resident and a citizen of the City and County of Philadelphia, Commonwealth of Pennsylvania, prays for a Writ of Certiorari to the Superior Court of Pennsylvania, to review an Order of the Supreme Court of Pennsylvania, entered March 26, 1943, (R. 120, 121), refusing his Petition for a review of a Judgment of the Superior Court of Pennsylvania, entered January 28, 1943 (R. 93), and an Order of said Superior Court of Pennsylvania, entered February 17th, 1943 (R. 106),

refusing his Petition thereto asking for a Re-Argument of the said Cause.

Opinions, Decrees and Orders, Below.

Decree of Judge Piekarski, Municipal Court of Phila., July 3, 1942 (R. 89).

Opinion of Judge Piekarski, Municipal Court of Phila., Sept. 15, 1942 (R. 89).

Opinion of Judge Rhodes, Superior Court of Penna., January 28, 1943 (R. 93).

Order of Judge Rhodes, Superior Court of Penna., February 17, 1943 (R. 106).

Order of the Supreme Court of Pennsylvania, entered March 26, 1943 (R. 120).

Jurisdiction.

The Order of the Supreme Court of Pennsylvania dismissing your Petitioner's Petition for review of the decisions of the Superior Court of Pennsylvania was entered March 26, 1943 (R. 120, 121). The jurisdiction of this Court is invoked under Sec. 237 (b) of the United States Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Did the courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

   (a) In denying your Petitioner "the equal protection of laws"?

   (b) In basing their decision on non-existing facts and by thus abusing their discretion, denying your Petitioner "Due Process of Law"?

2. Did the courts below err when they, in effect, refused your Petitioner the "Assistance of Counsel" in this a criminal case?

Statement.

Relevant Prior Proceedings.

On October 1, 1929 (R. 1.) on relation and Petition of your Petitioner's wife, Emma K. Barnes, for an order of Support, the Commonwealth of Pennsylvania prosecuted your Petitioner in the Domestic Relations Division of the Municipal Court of Philadelphia, Pennsylvania, in accordance with Title 18, "Crimes and Offenses", Chapter 5, Sections 1251-1258, Purdon's Penna. Statutes Annotated, Permanent Edition, for Non-Support of his said wife, which crime is therein designated a "misdemeaner".

On January 3, 1930, Walsh, J., of said Court, made an Order upon your Petitioner for $20. per week for said wife (R. 1); reduced by said Walsh, J., after hearing August 5, 1932, to $10. per week (R. 2), and remained at that sum until August 3, 1938 when it was reduced by Tumolillo, J., of said Court, to $5. per week (R. 2); but on August 30, 1939 said Order was increased by Piekarski, J., of said Court, on the wife's Petition for Increase, to $20. per week (R. 2), and said Order of August 30, 1939, was affirmed by Brown (President) Judge of said Court, on your Petitioner's Petition to Review same, November 21, 1939 (R. 3); but on your Petitioner's appeal to the Superior Court of Pennsylvania, as of No. 24 October Term, 1940, said Order of August 30, 1939 was reduced by that Court, Rhodes, J. (reported in Commonwealth ex rel. Emma K. Barnes v. Paul H. Barnes, 140 Pa. Superior Court 397, June 24, 1940) to $15. per week and Remittitur filed by said Superior Court July 5, 1940 (R. 3).

PRESENT PROCEEDINGS

On October 23, 1941, your Petitioner filed in said Municipal Court of Philadelphia, his Petition and Rule to show cause why the Support Order against him, of August 30, 1939, of $15. per week should not be vacated or substantially reduced because of his adversely changed financial condition. (R. 3-5); Hearings were held November 25, 1941 (R. 9) and March 27, 1942 (R. 61) before Piekarski, J. who on July 3, 1942 filed his Decree (R. 3, also R. 89) dismissing your Petitioner's said Petition, and filing his Opinion in support of his said Decree, September 15, 1942 (R. 3 and 89).

On July 25, 1942, your Petitioner appealed from the said Decree of Piekerski, J., of July 3, 1942, to the Superior Court of Pennsylvania (R. 91), and on July 25th, 1942 Writ of Certiorari issued out of the said Superior Court to said Municipal Court (R. 3 and 91); on September 24, 1942, Your Petitioner filed his Assignment of Error, to wit, that Piekarski, J. had erred in entering his said Decree of July 3, 1942 (R. 92-93); on November 12, 1942 Argument was had on said appeal, as of No. 259 October Term, 1942, before the said Superior Court (R. 92); on January 28, 1943, Rhodes, J., of said Superior Court, filed his Opinion saying: "The order of the court below dismissing petition is affirmed"; on February 8, 1943, Your Petitioner filed his Petition with the said Superior Court for Re-Argument (R. 92, 96-106); February 17, 1943 said Petition for Re-Argument was refused (R. 92 and 106); on March 11, 1943 your Petitioner filed his Petition for Allowance of Appeal from the said Superior Court to the Supreme Court of Pennsylvania (R. 92 and 107-120); on March 19, 1943, Appellee's Answer to said Petition for Allowance of Appeal, filed (R. 92, 121-123); on March 24, 1943, De-

fendant-Appellant's (your Petitioner's) Replication filed (R. 92 and 123-129) (also indexed in Record, page 111, as "Reply to answer to petition for allowance of appeal"); March 26, 1943, your Petitioner's said Petition for Allowance of Appeal to the Supreme Court "dismissed. Per Curiam."

SPECIFICATION of the stage in the PROCEEDINGS in the COURTS below, at which, and the manner in which the foregoing FEDERAL QUESTIONS sought to be reviewed were raised.

Question 1—Arising Question of denial to Petitioner of Due Process of Law.

(a)—In denying your Petitioner "the equal protection of the laws."

(b)—In basing their decision on non-existing facts and thus denying your Petitioner "Due Process of Law."

This denial by the Courts below occurred by their failure to apply to your Petitioner the established well-known principle of law as laid down in the recent like case of *Martocello* v. *Martocello*, 148 Pa. Superior Ct. 40 (1942) which says that in making an Order of Support the Court shall take into consideration the wife's separate income or earnings. And by a misconception of the facts as to Petitioner's wife's income at the time the Order of August 30, 1939 was made, whereby, without basis of fact, Rhodes, J. in his Opinion of January 28, 1943 (R. 96) stated her income now (during the accounting period of September 1, 1940 to August 31, 1941) was less than when said Order of $15. was made (August 30, 1939), thus resulting in abuse of the Court's discretion and depriving your Petitioner of his rights and property without "Due Process of Law."

Your Petitioner brought up this matter of his wife's separate income in paragraph 6 of his Petition to the Municipal Court of Philadelphia October 23, 1941 (R. 5), and at the Hearing of November 25, 1941 by calling the Girard Trust Company, Trustee of the Charles W. Klauder Estate, (deceased father of Mrs. Barnes) showing her income of $1151.78 paid her by said Estate for the said Accounting period (R. 60) and by calling Mrs. Barnes for cross examination and examining her in respect thereto, and in respect to her additional income of $67.50 from her stocks (R. 50-51) and as to her $200. bank deposit (R. 52) and again by recalling Mrs. Barnes at the Hearing of March 27, 1942 in respect to her said bank account (R. 74-75, 78-80, 88-89).

That in your Petitioner's Brief filed with the said Municipal Court, your Petitioner specifically asked in (paragraph) Point (y) page 10 thereof, the Court to consider his wife's separate income. See Appendix A.

And your Petitioner in his printed Brief before the said Superior Court brought up the matter at page 1 thereof (See Appendix B), and again forcefully argued it in argument of said question 2 (pages 6-8 of his said printed Brief) and Question 8 (page 1 and argued page 18 of his said printed Brief (Appendix B)).

In his Opinion of January 28, 1943, Rhodes, J. in the said Superior Court acknowledged the principle of law laid down in *Martocello* v. *Martocello,* 148 Pa. Superior Ct. 40 (1942) Stadfeld, J., but said that (R. 96):

> "the income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

Still, again, your Petitioner brought up this matter of his wife's separate income not actually having been taken into consideration in accordance with the *Martocello* v.

Martocello principle of law, in this like case, and of the absolute lack of evidence as to his wife's income in 1939 when said Order of $15 per week was made, in his Petition for Re-Argument before the Superior Court (R. 102 (7), R. 103 (8), R. 104-105). But that Court in its Order of February 17, 1943 dismissing your Petitioner's said Petition for Re-Argument entirely ignored the same (R. 92, 106).

Then, once more, your Petitioner, in his Petition to the Supreme Court of Pennsylvania for Allowance of an Appeal from the said Superior Court, raised this question (R. 114-115—Question C), but again it was entirely ignored in a "Per Curiam" decision without Opinion, dismissing said Petition.

Question 2—Petitioner's Counsel fees and legal expenses.

These Counsel fees and legal expenses were included in your Petitioner's "Expenses-Personal Income", "Exhibit A" (R. 6H, 6J, 6K) attached to your Petitioner's Petition of October 23, 1941 to the Municipal Court of Philadelphia, and for which your Petitioner claimed deduction from his income as therein set forth.

Your Petitioner, at Hearing of November 25, 1941, testified respecting Counsel fees paid by him during the "Exhibit A" accounting period (R. 15-16).

Your Petitioner in his Printed Brief handed up to the said Superior Court at the Argument, November 12, 1942, attacked the lower Court's denial of his reasonable deductions for his Counsel fees and legal expenses, as error, in Question 5 (page 1 of said printed Brief) and argued under that Question 5 (page 14 of said printed Brief) (See Appendix—B).

Judge Rhodes, of said Superior Court, in his Opinion of January 28, 1943, as to this Question said:

> "For example, items of expense included therein" ("Exhibit A") (R. 6A-6M) "which are clearly not

allowable for the purpose of determining the extent of his ability to pay a support order are: "* * *" (3) $325 (at least) for legal services in the course of this proceeding. The right of appellant's wife to support from him has been adjudicated, and there could be no justification to charge as expenses against his income, attorney fees and legal expenses incurred in his effort to vacate or reduce the amount of the support order" (R. 94).

Your Petitioner in his Petition to said Superior Court for Re-Argument raised this question of the denial of your Petitioner's deductions for Counsel fees and legal expenses as a Constitutional question under both the Constitution of Pennsylvania and the Constitution of the United States as a denial of your Petitioner's fundamental rights and a violation of his guarantees of "Due Process of Law" under Amendment XIV, Section 1, of the Amendments to the Constitution of the United States (R. 98 (3), 99-100). But said Superior Court in its Order of February 17, 1943 entirely ignored this question and your Petitioner's Constitutional argument thereon.

Again in your Petitioner's Petition to the Supreme Court of Pennsylvania for allowance of appeal thereto from said adverse decisions of said Superior Court, your Petitioner raised his objection to said denial to him of his deductions for Counsel fees and expenses in this Proceeding, as denying him his rights, fundamental and constitutional, under the Bill of Rights of both the Constitutions of Pennsylvania and of the United States, and referred the said Supreme Court of Pennsylvania to your Petitioner's forceful arguments on this Question in his printed Brief and in his Petition to said Superior Court for Re-Argument, aforementioned, both of which were handed up to said Supreme Court of Pennsylvania with your Petitioner's said Petition for allowance of said appeal from said Superior Court to said Supreme

Court of Pennsylvania (R. 116 (3)). But your Petitioner's said Petition was dismissed, March 26, 1943 by said Supreme Court: "Per Curiam", without an Opinion, and your Petitioner's said Constitutional rights and their said violation and denial, totally ignored.

Reasons for Allowance of Writ.

1. The failure of the Courts of Pennsylvania to impartially apply, in the instant case, the established and well-known law of Pennsylvania, as laid down in the like recent case, *Martocello* v. *Martocello,* (supra),—that the wife's separate income, or earnings, is to be taken into consideration in fixing the amount of a support order,—thus discriminating against your Petitioner and denying him the equal protection of the laws.

2.—That the Courts of Pennsylvania have abused their discretionary power in the instant case in saying the wife's income is less now than when said Order of $15 per week was entered when no testimony then on which to base such a statement, and by so doing, discriminated against your Petitioner, and have deprived your Petitioner of his rights and property without "Due Process of Law"; and in such case there is no discretion in the State Courts when a Citizen's Constitutional rights are infringed. See Commonwealth of Pennsylanvia *vs.* O'Keefe, 298 Pa. 169 (1929) Walling, Justice.

3.—The failure of the Courts of Pennsylvania to recognize your Petitioner's right to the services of Counsel in this criminal proceeding, whereby the Commonwealth of Pennsylvania is abridging the rights, privileges and immunities of your Petitioner as a citizen of the United States.

And as said reasons are more fully developed in Petitioner's "Supporting Brief" attached hereto.

Conclusion.

Also, it is to be noted by your Honorable Court that this is not a case dealing alone with the civil rights of one man, —*although your Petitioner's civil rights are sacred and entitle him to this, HIS, APPEAL TO YOU FOR THEIR PROTECTION,*—but it RAISES QUESTIONS OF THE CIVIL RIGHTS OF A GREAT BODY OF CITIZENS OF THE UNITED STATES OF AMERICA in the ever increasing, important, law of Domestic Relations,—a fact which is clearly shown by the published Reports in the instant case in the Courts of Pennsylvania,—for one instance thereof, see 30 A. 2d (No. 3 Advanced Sheet of March 13, 1943, pages 385 to 472) at pages XII and XIII and 437, et seq., thereof, where the importance of the questions raised in the instant case in respect to their bearing on the law of Domestic Relations, *generally,* is shown by the detailed index citations and "Headnotes" thereto.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

Dated June 26, A. D., 1943.

PAUL H. BARNES,
Petitioner.
CHARLES S. THOMPSON,
GEORGE W. CUPP, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

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vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. EMMA K. BARNES.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

Are as set forth in the accompanying Petition, pages 1 and 2 thereof.

Jurisdiction.

The Judgment, to wit: the aforesaid Order of the Supreme Court of Pennsylvania, now sought to be reviewed, was entered on March 26, 1943 (R. 120-121).

The Jurisdiction of this Court is invoked under the Judicial Code of the United States, Sec. 237 (b), as amended by the Act of February 13, 1925.

Statement.

A summary statement of the case is set forth in the accompanying Petition, pages 2-4, thereof.

Your Petitioner, since the reduction of the said Order to $15 per week by Rhodes, Jr. of the Superior Court of Pennsylvania, June 24, 1940, has been paying same in accordance therewith from the date of said Order by Piekarski, Jr., of the Municipal Court of Philadelphia, to wit, August 30, 1939, but because of your Petitioner's advanced age (now in his 72nd year) (R. 10), failing health, poorness of business, inability to maintain appropriate income from his investments, he finds himself unable to pay the said Order of $15 per week out of his combined business and personal investment income, but must take it from—and thus eat up—his principal (his capital).

A summary statement of the Argument is set forth in the Index, and as "Questions Presented" in the accompanying Petition, page 2 hereof.

Specification of Assignment of Error.

The failure of the Supreme Court of Pennsylvania to grant the review of the decisions of the Superior Court of Pennsylvania, as requested by your Petitioner, constituted an Affirmance of said decisions of the said Superior Court, and, in turn, constituted an Affirmance of the decision of the Municipal Court of Philadelphia, all of which is Error, with particular reference to the rights, immunities and privileges of your Petitioner *as a citizen of the United States* in respect to:

1. The Courts below erred, and discriminated against your Petitioner, *in not impartially applying an established, well-known principle of Pennsylvania law* as laid down in this class of cases, to wit, that a wife's separate income or earnings shall be taken into consideration in making a sup-

port order upon a husband, thus denying your Petitioner the equal protection of the laws, as guaranteed to him by the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9 and Sec. 11, and as guaranteed to your Petitioner, as a citizen of the United States by Article VI, Par. 2, of the Constitution of the United States as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

2. The Courts erred in their decisions when they, by misapprehension of the testimony, averred that your Petitioner's Wife's separate income was less in the accounting period of "Exhibit A" (R. 6A-6M) September 1, 1940 to August 31, 1941, now before this Court, than it was in the accounting period for the Order of August 30, 1939, which latter testimony is contained in the Record of the prior proceedings between these parties before the Superior Court of Pennsylvania, as of No. 24 October Term, 1940; (see Record thereof, pages 160a, 161a and 162a, as set out in "Appendix D" attached hereto and made part hereof. As a result of which misapprehension, the Courts below abused their discretionary power in an arbitrary and groundless manner, contrary to your Petitioner's rights, immunities, and privileges guaranteed to him as a citizen of Pennsylvania by its Constitution, Article 1, Sec. 1, Sec. 9, and Sec. 11, and as a citizen of the United States by Article VI, Par. 2, of the Constitution of the United States, and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States, and, further, constituted a deprivation of your Petitioner's rights and property "without due process of law", as guaranteed to him by Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States.

3. The Courts below erred in their decisions denying your Petitioner reasonable deductions—as set out in his

accounting, "Exhibit A" (R. 6H, 6J, 6K) for services of Counsel in advising him, and in preparing and representing him in this case—a Criminal Prosecution—contrary to his rights and privileges guaranteed to him by the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9 and Sec. 11, and by Article VI of the Amendments to the Constitution of the United States, as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

Argument.

Point I.

Question 1—Did the Courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

(a)—In denying your Petitioner "the equal protection of the laws?

In *Martocello* v. *Martocello* (*supra*) (1942), Judge Stadfeld of the Superior Court of Pennsylvania recognized the well established and well-known principle of law in cases of this kind, to wit: that in making an order for support of a wife, against her husband, whether it be the first order or be a reconsideration of an existing order on "Petition to Vacate or Substantially reduce" such Order, the wife's separate income or earnings shall be taken into consideration in fixing the amount of the Order, and he reversed the Municipal Court of Philadelphia for not so taking the separate income, or earnings, of the wife into consideration. That was a case essentially similar to the instant case, except there was a child there but that did not affect the case as the Father provided satisfactorily for the child, yet in the instant case, while Rhodes, J. in his Opinion of January 28, 1943 acknowledges this principle as set out in the

Martocello case, still he absolutely fails to take into consideration the substantial income of your Petitioner's said wife of $1151.78 from her Father's Estate (R. 51, 60) plus $67.50 from stocks, or $1219.28 from which she claimed a non-recurring item (foreclosure in her Father's estate) of $262.39, and the sum of $151.14, also, as deductions, thus reducing her income to $805.75, saying she did receive said $151.14 a few days before Sept. 1, 1940,—the date of the beginning of the "Exhibit A" (R. 6A-6M) accounting period, but as the Statement (Petitioner's Exhibit 4) (R. 60) shows it paid to her September 3, 1940, your Petitioner included it in her income before the Superior Court, alleging her income $956.89 (agreeing to waive her non-recurring item if she would waive your Petitioner's non-recurring items, which she would not do), so your Petitioner now claims her income for the accounting period should be what she took in, to wit. $1219.28, but still willing if he is allowed non-recurring items to permit her the same allowance.

There is no computation of figures, no rule or standard of measurement, in the said Opinion of Rhodes, J. of January 28, 1943 (R. 93, 96), showing along with the income figures of your Petitioner that Judge Rhodes did actually take into consideration the wife's said substantial income, wherefore your Petitioner avers that he was discriminated against by both Judge Piekarski, who entirely ignored in his Opinion of September 15, 1942, Petitioner's said Wife's income, and by Judge Rhodes, in this respect, and that they refused to give your Petitioner the benefit of the said principle laid down in *Martocello* v. *Martocello* (*supra*), although your Petitioner's facts are so similar to the facts in that case that if said Judges had given your Petitioner the "equal protection of the laws" they would necessarily have had to treat him the same as Judge Stadfeld treated Appellant Martocello,—the husband, and in not having

given your Petitioner the benefit of this principle of law, said Judges and Courts, and the Supreme Court of Pennsylvania by its affirmance of their decisions, also, have denied to your Petitioner the "equal protection of the laws" and his Constitutional rights under both the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9, Sec. 11, and the Constitution of the United States, Article VI, Par. 2, as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

And, there is another established, well-known principle of law in this class of cases in Pennsylvania, as stated by Keller, President Judge, of said Superior Court of Pennsylvania, in the case of Fort *v.* Fort, 124 Pa. Superior Ct., 151, 153 (1936), against an Order of support being so excessive that it depletes the principal (capital) of the husband, and in that case where the husband had squandered and wasted his principal, it was held that did not warrant the lower court (Municipal Court of Philadelphia), by way of reprisal, to make an order that necessitated further depletion of the principal, and, perhaps, its total exhaustion.

In the instant case, although Petitioner's accounting, "Exhibit A" (R. 6A-6M) showed he was compelled to use $402.00 of his principal to live,—during the accounting period,—besides incurring a principal (capital) liability of $511.23 for unpaid taxes on his Philadelphia properties during said accounting period, and if he had used all his $448.89 net income, as the explanation of his accounting—"Exhibit A"—(R. 112, 111) and Appendix—C, hereto, show, he would have still owed $62.32 on account thereof, so taking the $402. principal he used, the $62.32 necessary to complete paying said taxes, and add to that the $780. he paid his wife on the $15. per week Order, your Petitioner depleted his principal that accounting period between $1200. and $1300., so, again, the Courts below erred

and denied your Petitioner "the equal protection of the laws, when they did not likewise apply to him this principle "against depletion of the husband's principal" as laid down and applied by Keller, P. J. in this Fort *v.* Fort case, and thus again denied your Petitioner "Due Process of Law" so guaranteed to him by the Constitutions of Pennsylvania and of the United States, as aforesaid.

And although your Petitioner brought forcefully to the attention of the said Superior Court in his Petition for Re-Argument (R. 102 (7), 103 (8) this denial to him of his right to the equal protection of the laws and to due process of law (citing authorities for laying down rules of just measurement for both the husband and wife when the wife had a separate income or earnings,) and also later brought this matter forcefully to the attention of the Supreme Court of Pennsylvania in your Petitioner's Petition to them to review the decisions of the Courts below (R. 114 Question C), and therein also brought forcefully to their attention the principle of the Fort *v.* Fort case against depletion of the husband's estate by the burden of the Order (R. 111), yet in both instances your Petitioner's efforts for consideration and redress were ignored.

WHEREFORE, your Petitioner avers that the Courts below have grievously erred by their failure and refusal to impartially apply their laws equally to their citizens of Pennsylvania and to the citizens of the United States who are effected thereby as well as your Petitioner, and have grievously abused their discretionary powers to such a degree that such abuse has amounted to an actual, unreasonable, capricious, arbitrary, unlawful, inequitable discrimination against your Petitioner, contrary to his rights, privileges and immunities guaranteed to him by the Constitution of Pennsylvania and by the Constitution of the United States, who has thereby been placed in such jeopardy that he is

now compelled to come to this Court of highest resort humbly seeking protection for these, his sacred and guaranteed rights. See:

> Commonwealth of Pennsylvania *v.* Herman Petrillo, 338 Pa. 65, 98 (1940), 12 A. 2d. 317, 333, where Justice Maxey said:
>
> "Both the 9th Section of the Bill of Rights" (Article 1) "of the Constitution of this Commonwealth and the 1st Section of the XIV Amendment to the Constitution of the United States guaranteed in substance to one accused of crime *not only the forms but also the fundamentals of a fair trial.*"

Which principle was confirmed by the said Justice Maxey of the Supreme Court of Pennsylvania in the still more recent case of Commonwealth of Pennsylvania *v.* Petrillo, 19 A. 2d, 288, 299; 341 Pa. 209, at 233 (1941).

Also, the leading and recent case of Smith *v.* O'Grady, 312 U. S. 329, 85 L. Ed. 859 (1941) where the Supreme Court of Nebraska (as did the Supreme Court of Pennsylvania in the instant case) dismissed Smith's Petition for Review, without Opinion, thus affirming the lower (State) Court, Justice Black, of the Supreme Court of the United States, in his Opinion said, *inter alia:*

> "That the Constitution" (of the United States) is the Supreme Law of the Land, and upon the State Courts, equally with the Courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

Your Petitioner in the instant case is a man convicted of a misdemeanor in a criminal prosecution and has his liberty only because of his recognizance, so his position is analogous to that of Smith *(supra),* and in that case your Honorable Court allowed Smith's petition for writ of certiorari to the Supreme Court of Nebraska, and, at the Argument

before your Honorable Court, reversed the Supreme Court of Nebraska as having denied to Smith the "due process of law" guaranteed to him by the Constitution of the United States.

POINT II.

Question I—Did the Courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

> (b) In basing their decision on non-existing facts and, by thus abusing their discretion, deny your Petitioner "Due Process of Law".

While Judge Rhodes states in his Opinion of January 28, 1943, in the instant case (R. 93, 96):

> "Matters of this kind are largely within the discretion of the Court below and we do not interfere unless abuse of discretion appears."

Your Petitioner does not concede that such discretion applies to the instant case where Constitutional Rights are involved. See Case of Commonwealth of Pennsylvania *v.* O'Keefe, 298 Pa. 169 (1929) where Justice Walling said:

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. 6 R. C. L. 443."

This case was cited with approval and followed by Justice Sutherland in the leading case of Powell *v.* Alabama, 287 U. S. 45, 77, L. Ed. 158 (1932).

In the instant case, however, a reference to the testimony of November 25, 1941 (R. 9, 47) and March 27, 1942 (R. 61, 64) before Judge Piekarski, brought out the fact that the Petitioner's net income ("Exhibit A"—R. 6M) amounted

to $821.03 in his Personal Account Income, and (R. 6F) $332.69 in his Business Account Income, or a total of $1153.72 (R. 6A) (Recapitulation of "Exhibit A") from which, with the deductions shown thereon, your Petitioner's net income came down to the $478.76, but at the Argument before the Superior Court, November 12, 1942, a further non-recurring item of $29.87 received during said accounting period by your Petitioner as a Co-Executor's Commissions to your Petitioner as a Co-Executor with The Pennsylvania Company for Insurances on Lives and Granting Annuities, of the Mildred E. M. King Estate, were claimed as a further deduction by your Petitioner, which further reduced your Petitioner's said net income from $478.76 to $448.89 (R. 111-112, paragraphs (4) (5)). And, as shown above, if he had paid his taxes for the accounting period, with the $780 to his wife, etc., his capital would lose $1200 plus. While the Respondent's net income amounts to $956.89 if we allow her claimed non-recurring (foreclosure) item of $262.39,—and, including the sum of $780 received by her from your Petitioner on said Court Order, making a total income to her, other than said non-recurring item, of $1736.89.

As stated above in Point I, hereof, Judge Piekarski entirely ignored the Respondent's very substantial income, and Judge Rhodes just brushed it aside with the "offhand" statement (R. 96) in his Opinion of January 28, 1943:

> "the income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

This statement that your Petitioner's wife's income from her separate estate is now less than when said order was made, which would be August 30, 1939, is an utter misapprehension as is seen by a reference to the prior proceedings between these parties in the Municipal Court of Phila-

delphia in 1939, followed by your Petitioner's appeal to said Superior Court, as of No. 24, October Term, 1940 (Record of said proceedings pages 160a, 161a and 162a as set forth in Appendix-D attached hereto and made a part hereof), for there when Mrs. Barnes, Respondent, was examined as to her income for the year 1939, after stating two small payments received by her in the interest periods of March and June 1939, she was asked how much she expected to get for the interest periods of September and December 1939, and her Counsel objected to her testifying, whereupon she was asked if she expected to get as much as she did in 1938 (she having previously testified that she received $934—the largest income she had had for several years,—in 1938) and, over objection of her Counsel, she replied "I do not expect, I hope". So your Honorable Court sees plainly that there was no definite testimony as to what Respondent's income was for the accounting period which was the basis of the Order of August 30, 1939, so,—with no basis of fact upon which to make such a statement, your Petitioner contends that Judge Rhodes in his above quoted decisive statement had nothing upon which to exercise his discretion and, therefore, abused his discretion, and his Order retaining upon your Petitioner said $15 per week Order is against your Petitioner's rights to have the *fundamentals* as well as the *forms* of a *fair trial* in asserting the right of modification of the Order against him, a convicted man, in a Criminal Proceeding, as well as violating his rights, otherwise, of "Due Process of Law" and that he shall not be deprived of his property,—these weekly payments,—without "due process of law", as guaranteed to him by the Constitution of Pennsylvania and the Constitution of the United States, and enunciated by Justice Maxey of the Supreme Court of Pennsylvania, and by Justice Black in the hereinabove cited cases (Article VI, Par. 2, of the Constitution of the United States, and Article V and

Article XIV, Section 1, of the Amendments to the Constitution of the United States; and Article 1, Sec. 1, Sec. 9 and Sec. 11 of the Constitution of Pennsylvania.)

WHEREFORE, your Petitioner, believing his rights as a citizen of the United States as well as a citizen of the State of Pennsylvania, have been greatly abused by the Courts below denying them to him, as above set forth, now comes to this Court as a Supplicant, "with the Constitution of his Country in his hands," humbly seeking redress guaranteed to him by its sacred clauses, as stated by Justice Walling in the Supreme Court of Pennsylvania in Commonwealth of Pennsylvania *v.* O'Keefe, 298 Pa. 169 (1929), cited with approval by Justice Sutherland in Powell *v.* Alabama *(supra):*

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion: 6 R. C. L. 443. As was said by Mr. Justice Coulter in Brown *v.* Hummel, 6 Pa. 87, 97:
>
> " 'When the humblest citizen comes into this Court with the Constitution of his Country in his hands, we dare not disregard the appeal."

And your Petitioner begs this Court to accept this Petition and to permit him to argue this, his case, before your Honorable Court,—a case that involves in its principles, not only the rights of your Petitioner, but the sacred rights of thousands upon thousands of citizens of the United States, who, throughout the length and breadth of the land, are suffering injustices of this kind, and who, for the greater part, are unable by reason of distance, capital expense, and their inability to take time from their employments, to come to this Court and seek the redress they are entitled to under such provocation and denial of their civil rights which this Constitution, as the foundation of our Democratic form

of Government and the Supreme Law of the Land guarantees unto them.

Point III.

Question II—Did the Courts below err when they, in effect, refused your Petitioner the "Assistance of Counsel" in this a Criminal Case?

The courts below erred in refusing to allow your Petitioner the right to make reasonable deductions in his accounting ("Exhibit A") (R. 6H, 6J, 6K) for "legal services", "Counsel fees and expenses" in the course of this proceeding (See Opinion of Judge Rhodes, of January 28, 1943 (R. 94).

It is submitted that the instant case, namely, the prosecution of a husband for the support of a wife, is a *criminal proceeding,* and the crime a misdemanor; that a man's failure to support a wife carries with it arrest and imprisonment, and on conviction carries with imprisonment or fine, or both (Pennsylvania Penal Code of June 24, 1939; P. L. 872, "Wilful separation or non-support," Sec. 731; Purden's Penna, Stats. Annotated, Permanent Ed., Title 18. "Crimes and Offenses", Section 4731; also see "Desertion and Non-Support", said Penal Code of 1939, Sec. 733; Purden's said Penna. Statutes, Sec. 4733) and, therefore, it comes within the meaning of Article VI, Par. 2, of the Constitution of the United States, and Article V and Article VI of the Amendments to the Constitution of the United States, as enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States, wherein it is guaranteed that no person shall be deprived of life, liberty or property without due process of law, or the equal protection of the laws, and *that a person accused of crime "shall enjoy the right to" * * * "have the Assistance of Counsel for his defence.*

It is further submitted that Section 731 of the aforementioned Penal Code of Pennsylvania (1939) *give the right to the husband (your Petitioner) to show cause, whereupon such Order against him "shall be subject to modification by the Court," which proceeding is one in defence of his rights and property in the said Criminal Prosecution against him.*

And such "Assistance of Counsel" aforesaid necessarily carries with it, says Justice Sutherland in *Powel* v. *Alabama* (*supra*), (1932):

> "A fair opportunity to secure counsel of his own choice."

which is just what your Petitioner did in the instant case, and your Petitioner not coming within the classification of a "pauper," had no other recourse than to pay the reasonable fees of his counsel and the necessary legal expenses of this, his lawful proceeding, in the instant case (the reasonableness of which fees and expenses has never been questioned in these proceedings), which the Court below, by the Opinion of Judge Piekarski, of the Municipal Court of Philadephia (R. 89-90) and of Judge Rhodes of January 28, 1943, in the Superior Court of Pennsylvania (R. 93-94), in effect, basing their decisions on the erroneous conception that because your petitioner had failed to obtain a divorce from his said wife, in a previous divorce action of years before (*Barnes* v. *Barnes,* 116 Pa. Superior Ct. 92 (1935), your Petitioner had no right to the "Assistance of Counsel", contrary to your Petitioner's right thereto, guaranteed to your Petitioner in said Article VI of the Amendments to the Constitution of the United States—in asserting this, your Petitioner's lawful right to show cause for modification of the said Order of Support standing against your Petitioner in the said Municipal Court of Philadelphia.

Your Petitioner, in support of his contention that he has been grievously injured by this denial of his right of Coun-

sel and necessary legal expenses in his lawful petition in the courts below for "vacation or a substantial reduction" of said Order of Support against him, submits the premise that had he not been denied this right and had the reasonable amounts deducted by him for the employment of counsel and for legal expenses been properly considered and allowed to your Petitioner by the Courts below, the said Order would have been reduced.

Your Petitioner further avers that because of the said Courts below failing to allow such proper counsel fees and legal expense deductions, along with other deductions claimed by him, he has been forced to consume, because of the meagerness of his net income and earnings (See "Exhibit A" R. 6A, 6B),—some of his principal (capital) and also to, at the same time, incur capitale indebtedness for taxes on his properties in Philadelphia (R. 110 (3) 111 (4) and 111 and 112 (5)) which is contrary to the well established principle of Pennsylvania law as is laid down in such cases (*Fort* v. *Fort* (supra)).

Conclusion.

Wherefore, your Petitioner prays your Honorable Court, because of the gross and grievous injustice done unto him by the said Courts below, (the State Courts of Pennsylvania, by their arbitrary, unreasonable, and unConstitutional misuse of their powers and discretions,—as hereinabove set forth), to hear this, his Petition, and to make such ruling and decision as will afford unto your Petitioner the aid sought, in such a way as to bring to him the immediate vacation or substantial reduction of the said Order, which your Petitioner believes and contends may be legally and equitably done by your Honorable Court, and, in making such ruling and decision to point out the proper contitutional ways for the Domestic Relations Courts of this

Country (particularly in Pennsylvania) to make their Orders on Husbands for the support of their wives so that injustices such as in the instant case may not continue to be perpetrated in a manner contrary to the Constitutions, laws and decisions of their States, and the Constitution of the United States, as has been done in the instant case.

Respectfully submitted,

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.

1508 Real Estate Trust Building, Philadelphia, Pennsylvania.

APPENDIX A.

Point (y) page 10 of Brief filed by your Petitioner, Paul H. Barnes with Piekarski, J. of the Municipal Court of Philadelphia, subsequent to Hearings of November 25, 1941 and March 27, 1942, and arguing the contention of your Petitioner and his wife's separate income should be considered along with his income in said Court in deciding as to Vacation or Substantial Reduction of said Order of $15. per week, of August 30, 1939, against him:—

> "(y) That the incomes of both Petitioner and Respondent, are to be considered herein, and are as follows:
>
> "Petitioner's net income (making allowance for the non-recurring Co-Executor's Commission of $29.87 mentioned in paragraph (k) of this Brief, the non-recurring Contingent Interest of $272.50 and then adding the $221.33 brought to your Honor's attention at the request of Petitioner (Recapitulation, page 1 of Exhibit A of Petitioner's Petition) speaks for itself and shows a total net income received by the Petitioner, for the Accounting Period, of $448.89; while Respondent's income, as taken from the Testimony, pages 60 and 61 of November 25, 1941, and her exhibits (allowing her claim for the non-recurring item of $262.39) shows a total net income received by Respondent, for the Accounting period, of $805.75, not including therein the moneys received by Respondent from the Petitioner by order of the Muncipal Court."

(Note: the above $805.75 does not include the $151.14 which Respondent said was received by her before the beginning of said Accounting period of Sept. 1, 1940 to August 31, 1941, but which the Statement of Girard Trust Company, (Petitioner's Exhibit 4—R. 60) showed as paid to her Sept. 3, 1940, i.e. within the said Accounting period, and which was therefore claimed as part of her said income in Petitioner's printed Brief before the Superior Court of Pennsylvania (see Appendix-B hereof) making her income $956.89).

APPENDIX B.

QUOTATIONS FROM PETITIONER'S PRINTED BRIEF BEFORE THE SUPERIOR COURT OF PENNSYLVANIA AT ARGUMENT, NOVEMBER 12, 1943.

AS TO WIFE'S INCOME TO BE CONSIDERED IN CONJUNCTION WITH PETITIONER'S INCOME:

Page 1 of said printed Brief:

STATEMENT OF QUESTIONS INVOLVED.

"2. Whether the Court should not have taken into consideration Appellee's separate income in deciding the Appellant's petition for Vacation or Substantial Reduction of the Order?"

"8. Whether the Court erred in refusing to sustain Appellant's petition for Vacation or Substantial Reduction of the Order of $15.00 per week?"

ARGUMENT

QUESTION 2.

Page 6-7

"It is respectfully submitted that the Court below erred when it failed to take into consideration. IN FACT, TOTALLY IGNORED the *Appellee's substantial income* during said accounting period (September 1, 1940 to August 31, 1941), as shown by statement from the Girard Trust Company in the sum of $1151.78 (Petitioner's Exhibit No. 4, page 82a. Testimony of November 25, 1941) and by the testimony of Mrs. Barnes (Appellee) on cross examination (pages 69a to 71a, Testimony of November 25, 1941) that she received also from her New York Shipbuilding Company and "Pennroad" stocks the sum of $67.50 for the same period or a total independent income of $1219.28, from which, however, Mrs. Barnes (Appellee) deducts $151.14, which she claims she received *before* the said accounting period (although it shows on the Girard Trust Company statement as paid to her September 3, 1940 which is within said accounting period), and further

deducts $262.39 which she claims deductible as a "non-recurring" Capital Return item received from a foreclosed property, thus reducing her said $1219.28 income for said accounting period to a net independent income according to her said method of calculating of $805.75."

* * * * * * *

Page 8.

"Thus, giving Appellee every deduction asked by Appellee, she still had an independent income of $805.75 and the $780 received from Appellant during said Accounting period, or a total of $1585.75 as against Appellant's total lack of income and an actual depreciation of his estate of $331.11 and a then current tax liability of $511.23, besides Appellant's other large tax liabilities on his said real properties in Philadelphia, *so that is the reason Appellant asks this Court for a vacation of said Order, or, at least, a very substantial reduction thereof.*"

Question 8

Page 17.

* * * * * * *

at Page 18:

"Again, while Appellant has come before the Court below and before this Court with a petition showing vastly changed and depreciated conditions, backed up with a detailed and simple statement of every item of his income and expenses, with vouchers therefor, except in four isolated instances of minor payments, as explained by Appellant's counsel, Mr. Thompson, (pages 12a and 13a, Hearing of November 25, 1941), to the Court below, (other than expenses of Appellant's personal living, and the payments made to Appellee under the Order), Appellee, in her testimony, while on cross-examination, admitting she had about $200.00 in her bank account in the Land Title Bank and Trust Company, Philadelphia, later, on direct examination by her counsel testified she did not own all of said moneys in said bank account; that she did not know how much was hers and how much was her sister's, and, finally, that none

of the said $200 and over was hers, thus in her evasiveness flatly contradicting herself (Testimony of November 25, 1941, page 71a; Testimony of March 27, 1942, pages 103a to 104a and 108a to 111a, inclusive)."

As To Denial of Petitioner's Deductions for His Counsel Fees and Legal Expenses

Page 1 of said printed Brief:

"STATEMENT OF QUESTIONS INVOLVED.

"5. Whether the Court was justified in refusing to allow as deductions from Appellant's income his Counsel fees and legal costs?"

Question 5

Page 14:

"It is respectfully submitted that the Court erred in its attitude toward Appellant's counsel fees and legal expenses, because it is an established principle of this Democratic form of government that a man is entitled to his day in Court in any matter that he believes pertinent to his well being, and, a necessary sequence, it follows that, to accomplish such, he is entitled to proper representation, and, to have the same, must engage counsel, which Appellant did, and for which Appellant paid reasonable fees, there being no gratuitous bureau or method in the Courts providing for the same. (See Testimony of November 25, 1941, pages 20a and 21a)."

APPENDIX C.

Explanation of "Exhibit A"

This "Exhibit A", as contained in the Record in these proceedings, is as it appeared before the Superior Court of Pennsylvania at the Oral Argument, November 12, 1943.

After "Exhibit A" was completed and after the Hearing of November 25, 1941, your Petitioner discovered that he had inadvertently omitted therefrom income received by him during the accounting period, September 1, 1940 to

August 31, 1941, now before the Supreme Court of the United States, the sum of $221.33 income received by your Petitioner from the Estate of his Aunt, Mildred E. M. King, deceased, so your Petitioner voluntarily brought it to the attention of Judge Piekarski at the Hearing of March 27, 1942, at which time Judge Piekarski added said $221.33 to the $599.70 net Personal Income Gain at the foot of page 12 of said "Exhibit A" (Record, page 6M), thereby raising said Personal Income net gain to $821.03, but it was not added to the Personal Income Account for the month of October, 1941, on page 7 of "Exhibit A" (Record, page 6G—where the Petitioner's Personal Income for that month appears, as it did before said addition of $221.33, as $125.60), although said $221.33 was added to said month of October, 1941, in the Recapitulation, page 1 of said "Exhibit A" (Record, page 6A); nor was said addition of the $221.33 reflected *in the totals*, page 12 of "Exhibit A" (Record, page 6M) until added thereto, by agreement of the parties at the Bar of the Superior Court at the said Oral Argument, and then resulted in total Personal Account Income (which included Capital Returns) of $13,163.02 plus said $221.33 or $13,384.35, while the total Personal Account Expenses, page 12 of "Exhibit A" (Record, page 6M) remained the same, to wit: $12,563.32 (which included Capital Returns Re-invested).

Now, when the Capital Returns, page 2 "Exhibit A" (Record, page 6B) of $10,099.60 were deducted from the total Personal Account Income (which included said Capital Returns) of $13,384.35 that left your Petitioner's *gross* Personal Account Income $3,284.75 to which was added your Petitioner's *net* Business Account Income of $332.69 (Three Hundred Thirty-two Dollars and Sixty-nine cents),—after deducting the contested Rent Account and the contested Automobile Account,—thus making your Petitioner's total income, from both his Personal Investments and from his Business, the sum of $3,617.44 (which was agreed upon by Counsel for your Petitioner and for your Petitioner's said wife, at the Bar of the Superior Court at said Oral Argument, as correct) while the deduction of the $9,697.14 Capital Re-invested (page 2 of "Exhibit A" Record, page 6B)

from the total Personal Account Expense of $12,563.32 (which included said Capital Re-investments) left the sum of $2,866.18 as your Petitioner's expenses, and by then taking the said $2,866.18 from the total of Petitioner's Income of $3,617.44 leaves the sum of $751.26 shown in the Recapitulation (page 1 of "Exhibit A", Record, page 6A), and thereafter by the deductions claimed by your Petitioner in said Recapitulation, your Petitioner's net income was reduced to $478.76, as shown thereon, from which your Petitioner claimed in his printed Brief and at the Oral Argument before the Superior Court, November 12, 1942, a further non-recurring item deduction of $29.87, received by him as Co-Executor of the said Mildred E. M. King Estate, during said accounting period covered by said "Exhibit A" which reduced your Petitioner's said net income from $478,76 to $448.89 for said accounting period (which, of course, he would not have had, had he paid the taxes on his Philadelphia properties which he was unable to pay out of his income). See also Record pages 110, 111 and 112 Question A, (1), (2), (3), (4), (5).

APPENDIX D.

In the Superior Court of Pennsylvania, Philadelphia District

No. 24 October Term, 1940

Commonwealth ex rel. Emma K. Barnes

vs.

Paul H. Barnes, *Appellant*

Record

Appeal from the Order and Decree of August 30, 1939 of the Municipal Court of Philadelphia, Domestic Relations Division, No. 81622.

Page 160a.

Emma K. Barnes—Direct.

"Q. You receive an income, do you not, from the estate of your father, Charles Klauder, deceased?

A. Yes, I do receive an income.

Q. And your income during the year 1939—has that been less than the income which you received from the estate in 1938?

A. It was less.

Q. How much?

A. About $60.

Q. How much did you receive in 1939 thus far?

A. I received $265.72.

Page 160a.

Emma K. Barnes—Direct.

Q. Other than the income of $266—

A. $265.

Q. Which you received thus far this year from your father's estate, and the $5 a week you have been receiving from your husband, do you have any other source of income?

A. I have no other source of income.

Page 161a.

Emma K. Barnes—Cross

Cross Examination.

By Mr. White:

Q. What is the interest of your father's estate?

A. One-fifth of the income.

Q. Don't you have any interest in your mother's estate?

A. No, my mother did not leave any estate in trust.

Q. Her interest after her death was merged into your father's estate, is that right?

A. My mother's estate was a little estate, separate, but her estate—her interest in my father's estate came to us at her death.

Q. You say that your income so far this year has only been $265?

A. Yes.

Q. You expect another dividend the 1st of September, don't you?

A. Yes, the first week in September.

Q. You get another dividend?

(Not answered.)

Q. About how much will that be?

A. Last year it was $213. Of course, you can't tell, it varies. It might be less.

Q. This year you expect practically $175 to $200 on the next quarter?

Page 161a.

Emma K. Barnes—Cross.

A. I don't say I expect it; I hope for it.

Q. Then you have another dividend in December, don't you?

A. Yes.

Q. How much did you get last year from the estate of your father?

A. Last year? I received $934.74.

Q. This year you expect to receive the same with probably a difference of $60?

Page 162a.

Mr. Kagle: That is objected to. Her testimony would be incompetent as to her expectation. She received $900 last year. She is only speculating——

The Court: Up to date she got $265; she will get another dividend in September. If she knows what her interest will be she may testify.

By Mr. White:

Q. When did you get your first dividend this year?

A. March 1st.

Q. You got how much money?

A. $128.22.

Q. Then you got the next dividend when?

A. June 1st.

Q. Then you will get the next dividend around September?

A. Around September, yes.

Q. Your other dividend is in November or December?

A. December.

Q. Last year you received $965, is that right?
A. $934. That was unusually large, larger than it was in 1937.
Q. This house your husband lives in, which he values at $10,000—he lives there by himself, does he not?
A. I can't say: I don't know.

Page 162a.

Emma K. Barnes—Cross.

Q. The house down at Dorchester is unoccupied, to your knowledge?
A. I know nothing about that.

Certification as to Correctness of Quotations.

We, George W. Cupps, Jr. and Charles S. Thompson, Esquires, Counsel for Paul H. Barnes, Petitioner to the Supreme Court of the United States for Writ of Certiorari to the Superior Court of Pennsylvania, do hereby certify the above quotation from pages 160a, 161a and 162a of the Record of the above entitled proceedings to be true and correct.

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel as aforesaid.

FILED
SEP 14 1943
CHARLES ELMORE CROPLEY
CLERK

(19)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL KAGLE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,
vs.
COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES.

RESPONDENT'S BRIEF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Emma K. Barnes, above-named Relatrix by her Counsel, Samuel Kagle, Esquire, respectfully urges that the Petition of Paul H. Barnes for a Writ of Certiorari be dismissed and in support of this prayer it is respectfully submitted:

1. The facts in the case fail to present a substantial Federal question.

2. Although Petitioner avers that he raised the questions as to the denial of Due Process in the Courts below, the Assignment of Error and the Statement of Questions Involved in the record before the Superior Court of Pennsylvania fail to disclose that such questions were raised. The Assignment of Error filed in the Superior Court, which under the existing law is the exclusive appellate forum for Domestic Relations Cases, appears on page ninety-three (93) of the Transcript of Record. In the interest of brevity the Assignment will not set out verbatim but it was directed

merely to the dismissal of the Petition to Vacate or to Reduce the existing support order.

The Petitioner's brief in support of his appeal raised eight questions but none raised the question of the denial of Due Process. The Statement of Questions involved in the brief is not part of the record which is before this Court, and it is appended hereto as Exhibit "A".

3. The cause which the Petitioner has vigorously prosecuted through the several Courts of the Commonwealth of Pennsylvania is lacking in merit and is only brought to harass a needy wife whose right to support has been continuously upheld by said Courts since 1929.

I. The Contention As to a Denial of Due Process Is Without Merit.

Petitioner contends that the action of the Courts below violated the Due Process Clause of the Federal Constitution. The basis for this remarkable contention is that because the Pennsylvania Courts refused to allow credit for the amounts paid for counsel fees in these proceedings as deductible expenses in arriving at the net income in fixing the amount of support he was in effect denied the right to be heard by Counsel. *Petitioner—a man of substantial means—was represented by Counsel at every stage of the proceedings which have been heard by the Courts on at least sixteen (16) different occasions, and in the present proceeding he has been represented by two Attorneys in the Trial Court and on appeal.*

In *Grozza* v. *Tierman,* 138 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, the Supreme Court said:

> "Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of powers of government."

In the instant case these requirements have been fully met in every respect.

II. The Federal Question Was Not Properly Raised in the Court Below.

Assuming that a substantial Federal question did exist, we respectfully urge that this Honorable Court should deny the Certiorari because the question was not properly raised in the Courts below.

Under the Law of the Commonwealth of Pennsylvania the Superior Court is the exclusive appellate forum in Domestic Relations cases, and as we have pointed out hereinabove the Petitioner failed to raise said constitutional questions in his Assignments of Error or the Statement of the Questions Involved.

In *Herndon* v. *State of Georgia*, 295 U. S. 441, 55 Sup. Ct. Rep. 794, this Court held that it was without jurisdiction to review a case because no Federal question was seasonably raised in the Court below or passed upon by that Court. The Court said (R. 443):

> "The Federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that Court then refused to consider it. The long established general rule is that the attempt to raise a Federal question after judgment, upon a petition for rehearing comes too late unless the Court actually entertains the question and decides it".

In the instant case the same situation exists. The first time the Federal question was raised by Petitioner was after final judgment of the Superior Court and on Petition for Reargument. In this case the Court never decided the question.

In conclusion we respectfully urge that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

SAMUEL KAGLE,
Counsel for Respondent.

EXHIBIT "A".

I.

Statement of Questions Involved.

1. Whether divorce action of Appellant *v.* Appellee, previously disposed of, had any bearing on question at issue?

2. Whether the Court should not have taken into consideration Appellee's separate income in deciding the Appellant's petition for Vacation or Substantial Reduction of the Order?

3. Whether the Court was justified in refusing to allow Appellant's deductions of "non-recurring" or "infrequent" income?

4. Whether the Court was justified in refusing to allow Appellant's deductions of office rent and cost of and maintenance of automobile?

5. Whether the Court was justified in refusing to allow as deductions from Appellant's income his Counsel fees and legal costs?

6. Whether the Court erred in considering Capital Return, re-invested, as Income?

7. Whether the Court erred in not considering Appellant's liability for taxes as affecting his income status?

8. Whether the Court erred in refusing to sustain Appellant's petition for Vacation or Substantial Reduction of the Order of $15.00 per week?

FILED
OCT 28 1943
CHARLES ELMORE CROPLEY
CLERK

(20)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA ex Rel. EMMA K. BARNES.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR REHEARING.

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.

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Pennsylvania v. *O'Keefe*, 296 Pa. 169	2
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158	2

Constitutions Cited.

Constitution of the United States:

Article III, Sec. 2, Clause 1	6
Article VI, Par. 3	5
Article XIV, Sec. 1	5

Constitution of Pennsylvania:

Article 1, Sec. 1	5
Article 1, Sec. 9	5
Article 1, Sec. 11	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

vs. *Petitioner,*

COMMONWEALTH OF PENNSYLVANIA ex Rel. EMMA K. BARNES.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

The Petition of Paul H. Barnes, by his Counsel, respectfully represents:

That, on June 26, 1943, your Petitioner, having, theretofore, on March 26, 1943, been denied his Petition for Appeal from the Superior Court to the Supreme Court of Pennsylvania, filed his Petition to your Honorable Court for a Writ of Certiorari to the Superior Court of Pennsylvania, and

on October 11, 1943, your Honorable Court denied your Petitioner's said Petition.

That, appreciative of the consideration heretofore received from your Honorable Court, and with the abiding and implicit faith, inherited by our citizens of Colonial and Revolutionary War ancestry, in the Constitution of our Country and its interpretations by your Honorable Court, both of which derive their inspiration from the free men who voluntarily bound themselves in the Cabin of the "Mayflower" on that 21st day of November, 1620, to institute a government of freedom, as Bancroft says: "on the basis of equal laws enacted by all the people for the general good," your Petitioner, because of the discriminatory denial to him, by the Courts of Pennsylvania, of this anciently guaranteed equal application of its laws, again humbly comes appealing to your Honorable Court for a reconsideration of his Petition for Certiorari to the Superior Court of Pennsylvania, citing Mr. Justice Coulter in *Brown* v. *Hummel,* 6 Pa. 87, 97:

> "When the humblest citizen comes in this Court with the Constitution of his Country in his hands, we dare not disregard the appeal."

And, Mr. Justice Walling in *Commonwealth of Pennsylvania* v. *O'Keefe,* 296 Pa. 169 (1929), (cited with approval by Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U. S. 45, 77 Law Edition 158):

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion: 6 R. C. L. 443."

And, calling to your attention Question I and its sub-divisions (a) and (b) of his said Petition for Writ of Certiorari (page 2), to wit:

QUESTION I.

Denying your Petitioner Due Process of Law, by

(a) *Denial to him of the Equal Protection of the Laws,* by actually not applying to your Petitioner *the rule of law in Pennsylvania,* affirmed by Judge Stadtfeld in the recent case of *Martocello* v. *Martocello,* 142 Pa. Superior Ct. 40 (1942), *that the Courts must, in making such Order upon the husband, take into consideration the separate income or earnings of the wife,* and thus discriminating against your Petitioner.

This denial of the equal protection of the laws involves, in Pennsylvania and most of the other States of the United States, an entire lack of any rule or formula of calculation which indicates at all—much less with an exactness—how the Courts in Pennsylvania and such States take into consideration the wife's separate income or earnings in making an Order upon a husband for the wife's support, when living separated from her husband, as in the case at Bar, and, although your Petitioner in his Petition to said Superior Court of Pennsylvania for Re-Argument (which went as part of his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania) quoted (Record 103, 104) *Decker* v. *Decker,* 279 Ill. 300, 116 N. E. 638, that:

> "The method of computing the award when both have income is to consider what the wife should be allowed from the aggregate amount of both incomes, subtract her separate income, and award her the balance."

And, *Flavell* v. *Flavell,* Chancery of New Jersey, 178 A. 69:

> "Where the parties while living together maintained themselves satisfactorily on $30. per week; wife's personal income amounted to $800. annually, and her husband since separation inherited $110,000. and had an annual income of $6,000., husband was ordered to con-

tribute $700. annually toward wife's separate maintenance, and, in addition to pay master's fees and wife's counsel fee.

"The Court must carefully limit order for separate maintenance to demands of necessity as discerned by complainant's condition and station in life and defendant's ability to pay, and an order for amount calculated to render separation attractive to complainant is unwarranted."

(Your Petitioner has less than One-Quarter of the Principal,—and that subject to thousands of dollars liability for unpaid real estate taxes,—and *gross income* of only about one-half that of the Defendant in the *Flavell* case; while Mrs. Barnes has considerably more annual income than Mrs. Flavell's $800., yet the Order your Petitioner appeals from is $780., annually, as against the $700. per annum Order made by the Chancellor in the *Flavell* case.)

And your Petitioner in his aforementioned Petition to said Superior Court for said Re-Argument, suggested a rule or formula of calculation to be used in such cases *so that the parties might know that the wife's separate income or earnings were really taken into consideration in making the ORDER upon the husband, and to what extent, yet, still, in Pennsylvania, as this case at Bar clearly shows,* the decision *may say* that *the Court has taken the wife's separate income or earnings into consideration in making the Order, but there is absolutely nothing to show that is really the case, and to what extent; or that the Court has not, as was done in the case at Bar:*

QUESTION I.

(b) *Abused its Judicial Discretion by taking into consideration, as facts, false assumptions as to the size or amount of the wife's separate income or earnings, which, in the case at Bar, would never have been known but for*

the statement by Judge Rhodes in his opinion of January 28, 1943, where he said:

> "The income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

and which your Petitioner, by reference to the wife's testimony at the time of making said Order in 1939, (Petitioner's Brief in Support of Petition for Writ of Certiorari, Appendix D, and argument therein, pages 19-23) showed was not correct, as the wife in 1939 was not allowed by her own Counsel to testify as to her income, other than in 1938 it had been $934.74,—more than for any year for several years prior thereto. *Yet that $934.74,* which she said she did not expect but "hoped" to get in 1939, *was less,* even if she did get it in 1939, *than the $1219.28, or,* if we allow her claimed non-recurring (foreclosure) item of $262.39, *the $956.89, which she admitted she had received in the period covered by your Petitioner's Exhibit A* (Record 6A), *September 1, 1940 to August 31, 1941,* and, *so, completely contradicts Judge Rhodes's said assumption in the aforesaid quotation.*

And, Thus, by This Abuse of Judicial Discretion, and the denial to him of the equal application to this case of the *Martocello* v. *Martocello* rule, your Petitioner was deprived of the Due Process of Law guaranteed to him under the second and third paragraphs of Article VI of the Constitution of the United States, as enforced by Section I of Article XIV of the Amendments thereto; and under Article 1, Sec. 1, Sec 9, and Sec. 11 of the Constitution of Pennsylvania.

And, further, as to Question 1 (b), aforesaid, Denial of Due Process of Law by Such Judicial Abuse of Discretion, it is a matter of National Public Interest that your Honorable Court should grant Petitioner a Hearing on his said

Petition for said Writ of Certiorari *and, at the time of the decision thereon, enunciate a rule or formula of calculation to be used in arriving at the amount of such ORDER upon a husband where a wife is living separated from him, so that there will be no room, thereafter, for such ABUSE OF DISCRETION TO CREEP IN,* and rob either the husband or wife of their just decision in the matter of such support and thus to deny to either of them the *due process of law* guaranteed to both of them under the Constitution of the United States.

That your Honorable Court has the authority to so define and declare such rule is shown by: Page 284, U. S. Code, Annotated, U. S. Constitution, Article III, Sec. 2, Clause 1:

> "The Judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" * * *

Note 68. "Jurisdiction of Courts of the United States as depending upon Legislation by Congress:" * * *

> "SMITH *v.* ALABAMA (Ala. 1888), 124 U. S. 478, 8 Sup. Ct. 564, 31 L. Ed. 508, citing WHEATON *v.* PETERS (Pa. 1834), 8 Pet. 591, 8 L. Ed. 1055, and saying: 'A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstances that the courts of the United States, in cases within their jurisdiction, where *they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment.* This is illustrated by the case of New York Cent. R. Co. *v.* Lockwood (N. Y. 1873) 17 Wall (U. S.) 357, 21 L. Ed. 627, where the common law

prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state, *but the law as applied was none the less the law of that state.*"

WHEREFORE, your Petitioner prays your Honorable Court to grant unto him this reconsideration of his said Petition for Writ of Certiorari to the Superior Court of Pennsylvania, that you may hear Argument thereon, and, by your decision, give your Petitioner the relief requested, and lay down such a fair and equitable Rule for making an Order upon the husband in such cases that thousands of others may have the benefit of such definiteness in this rapidly expanding law of "DOMESTIC RELATIONS" that so vitally affects the homes and happiness of all our people.

And your Petitioner will ever pray, &c.

Respectfully Submitted,

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.

Certificate.

It is hereby certified, that the foregoing Petition for Reconsideration of Denial of Petition for Certiorari to the Superior Court of Pennsylvania is filed in good faith and not for purposes of delay; that Petitioner did not ask for Stay of Proceedings pending the disposition of this matter, and by his punctual payments is fully complying with the Order of the Courts below in this case.

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.